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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALEXIS ADAMES, JR., Defendant and Appellant.	B254815 (Los Angeles County Super. Ct. No. TA123760)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Timothy M. Weiner, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Alexis Adames, Jr. (Adames, Jr.), was charged with murder (Pen. Code, § 187, subd. (a)) and with personally having used a deadly weapon, a knife, in the commission of the murder in violation of subdivision (b)(1) of section 12022.[1] A jury found him guilty of second degree murder and found the allegation true that he had used a knife in the commission of the murder. Defendant was sentenced to 16 years to life in state prison, one of those years being a consecutive sentence for the violation of subdivision (b)(1) of section 12022. This appeal is from the resulting judgment.

The sole issue before us is whether the trial court should have sua sponte instructed the jury on involuntary manslaughter as a lesser included offense. Because we find that the evidence would not have supported an involuntary manslaughter instruction, we affirm.

BACKGROUND

The prosecution's case

Around 9:00 p.m. on June 23, 2012, Jose Marquez (Marquez) and his girlfriend Vasthi Lopez (Lopez) drove in Marquez's jeep to a laundromat in Compton, California.[2] They were looking for Jairo Pineda (Pineda), the eventual murder victim, in order to go out to eat. Marquez, who was 20 years old when he testified at trial, had known Pineda since fifth grade and considered Pineda a close friend. Alexis Cortez (Cortez), whom Marquez had also known since fifth grade, and Pineda were at the laundromat, as was another friend, Romel Rodriguez (Rodriguez). Cortez, Pineda, and Rodriguez were doing their laundry and drinking beer.

Across the street from the laundromat was a car wash. A girl, later identified as defendant's sister G., was in front of the car wash.[3] G. walked toward the laundromat, Marquez, and the others. Pineda and G. talked for 30 seconds, but did not come in

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[1] All further statutory references are to the Penal Code.

[2] The following summary is based largely on Marquez's testimony; the testimony of other witnesses is specifically attributed to them. The pertinent portions of defendant's testimony are set forth in a separate section of this opinion.

[3] G. was 16 years old at the time of trial in December 2013.

physical contact. G., who was alone, then walked away. When asked whether she appeared upset, Marquez answered, "No, she insult us." On cross-examination, Marquez testified that she walked away "visibly upset." G. walked away through an alley and Marquez lost sight of her.

Later, two girls came through the same alley through which G. had walked. The two girls spoke with Marquez, Pineda, and Cortez. It was a friendly conversation that lasted one to two minutes, after which the two girls left through the alley.

Then eight people came, apparently through the same alley, and went away. Next, four people "reappear[ed] in the alley" and then disappeared. Four people came back; defendant and his father, Alexis Adames, Sr. (Adames, Sr.), were two of those four people. Defendant held a bat that was two and a half feet long in his left hand. According to Cortez, defendant was holding a thin silver knife with a black handle, which was seven to eight inches long, in his other hand. Lopez and Rodriguez confirmed that was holding a bat and a knife when he appeared in the alley.

Adames, Sr. began arguing with Pineda. He told Pineda that the girl he had been talking with was his daughter and asked why was he talking "shit" to his daughter. According to Cortez, Adames, Sr. asked Pineda why he tried to kidnap his daughter. Pineda said he was sorry and that he did not know she was a minor. Adames, Sr. was angry. He hit Pineda in the face with his right hand. Defendant was a step behind his father. Lopez testified that defendant tried to hit Pineda with the bat but, according to Rodriguez, Pineda ducked. Pineda pushed defendant away and hit defendant with a beer bottle.

Pineda started running across Compton Boulevard. Defendant and his father, as well as the others, ran after him. Rodriguez testified that defendant was still holding the bat and the knife as he was running after Pineda.

Marquez, Lopez, and Cortez got into Marquez's car, hoping to catch up with the pursuit. They were stopped by a red light, which appeared to take "forever" to change. They drove on to Cortez's house, which was in the vicinity, where they found Pineda by the car of Cortez's sister. According to Cortez, Pineda was holding on to the car and

there was blood on his shirt. Pineda said he wanted water; he was crying. At some point, Pineda had yelled out that he had been "shanked." Cortez asked him what happened, and Pineda said "'a Puerto Rican did it.'" Defendant's nickname was "little Puerto Rico." Pineda fell to the ground and Marquez called 911.

Defendant ran off to the house of a neighbor, Carmen Torres, where he was overheard to say, "'I did what I had to do because of familia.'" The medical examiner testified that the cause of death was a stab wound to the chest.

Defendant's testimony

Defendant testified in his own defense. On the night in question, while he was at home, G. came to him crying, saying that someone at the laundromat had tried to get her to go inside a car. Defendant became angry and upset because "[t]hat's my little sister right there." Defendant, G., and some others walked through the alley. G. pointed to a group of people and evidently singled out Pineda. By this point in time, someone had told defendant that Pineda had tried to kidnap G.[4]

Defendant turned around because he did not want to confront Pineda by himself and went back to the house where he spoke with his father. Defendant picked up a bat that was by the front door and grabbed a black-handled kitchen knife with a silver blade that was on the kitchen table. When asked what he was thinking when he picked up the bat and the knife, defendant answered: "I was angry because someone was trying to do something to my sister, so I was real angry."

Defendant and his father walked again through the alley. Adames, Sr. got into an argument with Pineda. Defendant saw Pineda holding a beer bottle "like he was going to attempt to do something." Defendant thought that Pineda was going to hit him or his father with the bottle, so he pushed his father aside and swung at Pineda with the bat. Pineda hit defendant on the top of his head with the bottle. Pineda took off running.

Defendant testified that at this point in time he was really angry and upset. "I was mad that all the stuff that was going on, it was real, like, it was crazy. Then I just ran."

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[4] The record does not reveal when or who gave defendant this information.

He ran after Pineda. They ran through the alley and out into a street that defendant identified upon questioning as Barron Street. Defendant described what happened next: "[Pineda] turns around quick and he grabs me. I grab him. That's when I stabbed him." Defendant was asked: "Do you know how it is that you made the movement that caused you to stab him in the way that you did?" He answered: "I don't know. It just happened. I didn't mean for it to happen." He elaborated: "Well, it was like something that wasn't me. I didn't feel like it was me. Because I don't think I'm capable of something like that. It was just something, like, it was a reaction to everything. It was, like, quick. I didn't have much time to think about anything." Defendant expressed his regret at having taken a life.

Defendant fled the scene and went home, where he dropped the bat and knife on the living room floor. He then went to Carmen Torres's house and tried to disguise himself by "[w]etting down [his] hair" and taking his shirt off, leaving on a "muscle shirt" because he "didn't want the cops to, like, to find me because I didn't want to go to jail[.]" Defendant did not know what happened to the bat and knife; the bat was never found but the police found three knives with black handles in the drying rack in the kitchen at home.

Procedural History

Adames, Sr. and defendant were both charged with murder. The prosecution's theory against Adames, Sr. was that he had aided and abetted the murder. The prosecution sought a second degree murder conviction against defendant.[5] The trial court instructed the jury on the elements of second degree murder, and at the request of the defense, on the lesser included offense of voluntary manslaughter as well. When given

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[5] The prosecutor had also requested the jury be instructed on first degree murder. The trial court refused to do so because premeditation was not alleged in the charging document or at the preliminary hearing, the evidence at trial would not have supported such an instruction, and introduction of that charge at the end of trial would have prejudiced the defense and confused the jury.

the opportunity to request additional instructions, the defense did not request an instruction on involuntary manslaughter, nor did it do so at any other time during trial.

During deliberations, the jury asked for "clarification" on "Implied Malice Aforethought" and read back of the medical examiner's testimony and defendant's testimony regarding "what happened on Barron where act occurred," and asked "[h]ow tall was Jairo [Pineda]?" The trial court responded, "You have the law which defines 'implied malice' and I have flagged the instruction which you can reread. Again, this is a question of fact for the jury." The trial court also instructed that Jairo was 5 feet 9 inches and that the court reporter "will read back the testimony you requested."

The jury hung as to Adames, Sr. and convicted defendant of second degree murder. Defendant filed a motion for a new trial or reduction of the offense, in which defendant argued that the evidence did not support his conviction for second degree murder, but instead, only for voluntary manslaughter. The trial court denied the motion. In denying the motion, the trial court stated, in pertinent part: "'[T]he concern I have here is that there's no reason for this incident to have occurred. There's absolutely no provocation for [defendant] to have chased after the victim when he left. The victim even apologized, and he was gone. And he fled the scene. And there was no reason for [defendant] to pursue him. . . . [¶] . . . I just don't think [the motion for reduction is] warranted . . . where everyone should have cooled down after the initial confrontation and this never would have happened. Almost everyone cooled down except for [defendant]. And for that reason in some ways he acted as a vigilante."

DISCUSSION

Defendant contends that the trial court had a duty to instruct sua sponte on the lesser included offense of involuntary manslaughter. He asserts that the jury could have found that defendant was merely "criminally negligent" and that the jury's request for clarification on implied malice and aforethought, read back of defendant's testimony, and inquiry into Pineda's height all showed that the jury was unsure "if [defendant's] split-second reaction when Pineda turned and grabbed him demonstrated malice aforethought."

General principles and standard of review

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.]" [6] (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) A trial court must instruct sua sponte on a lesser included offense if there is substantial evidence that, "'if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser'" one. (*People v. Souza* (2012) 54 Cal.4th 90, 115–116.) Substantial evidence in this context is "'evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.'" (*Id.* at p. 116.) The substantial evidence requirement is not satisfied by any evidence, no matter how weak. (*Ibid.*) This duty to instruct exists notwithstanding the defendant's wishes, trial theories, or tactics. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

We independently review whether instruction on a lesser included offense should have been given. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

The definition of involuntary manslaughter

Section 192 defines manslaughter as "the unlawful killing of a human being without malice." Subdivision (b) of section 192 further provides that manslaughter is involuntary if it is perpetrated "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

By definition, "[i]nvoluntary manslaughter is . . . inherently an unintentional killing." (*People v. Broussard* (1977) 76 Cal.App.3d 193, 197.) More than mere negligence is required for involuntary manslaughter. "'The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a

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[6] We therefore reject the Attorney General's contention that defendant forfeited his claim of instructional error by not requesting an involuntary manslaughter instruction when the trial court inquired into whether there were any objections regarding the proposed jury instructions.

departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.'" (*People v. Penny* (1955) 44 Cal.2d 861, 879.)

"'"A killing is 'unlawful' if it occurs (1) during the commission of a misdemeanor inherently dangerous to human life, or (2) in the commission of an act ordinarily lawful but which involves a high risk of death or bodily harm, and which is done 'without due caution or circumspection.'"'" (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1026 (*Guillen*).)

Quoting from *People v. Penny*, *supra*, 44 Cal.2d at page 879, the *Guillen* court defined "'"without due caution and circumspection"'" to "'refer to criminal negligence—unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences.'" (*Guillen*, *supra*, 227 Cal.App.4th at p. 1027.) Particularly pertinent to the issue before us, the *Guillen* court contrasted criminal negligence that would support an involuntary manslaughter instruction and murder based on implied malice:[7] "'If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice.'" (*Ibid.*)

The evidence did not support an instruction on involuntary manslaughter.

Just as in *Guillen*,[8] the record here would not have supported a finding that the stabbing in this case was merely criminally negligent. As defendant himself related, he

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[7] "[M]alice is implied 'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life' [citation]." (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

[8] In that case, the appellate court found "the record . . . devoid of evidence from which a reasonable jury could conclude appellants were guilty of involuntary manslaughter on the theory they were criminally negligent. The evidence [of inmates attacking another inmate in on child molestation] demonstrates each appellant committed

deliberately armed himself with a bat and a kitchen knife before confronting Pineda. Defendant did not bring the weapons with him just for show. This became apparent when he tried to hit Pineda with the bat when Adames, Sr. was arguing with Pineda and when defendant, armed with the bat and knife, ran after a then-fleeing Pineda and confronted him on Barron Street. As the trial court pointed out in denying defendant's new trial motion, instead of walking away, defendant pursued Pineda with both weapons in hand. The evidence demonstrated that defendant armed himself because he intended to use, and did use, those weapons.

It was uncontested that from the moment he heard G.'s story, defendant was angry, indeed, very angry. It is misleading to focus, as defendant does, on the moment of the stabbing and defendant's testimony that the stabbing "'just happened.'" There also was no evidence that Pineda somehow impaled himself on the knife, or that defendant's hand slipped into Pineda's chest, or that defendant fell and the knife went into Pineda's chest.

Defendant's flight from the scene is inconsistent with defendant's new-found legal theory as well. Defendant fled the scene, tried to disguise his appearance, and somehow did not know what happened to the bat, which had disappeared, or the knife, after he dropped both on his living room floor. The police did find clean kitchen knives with black handles in the kitchen drying rack, but defendant could not "remember" if any of those knives was the one he used to stab Pineda. In sum, the record bespeaks of implied malice and not criminal negligence. To paraphrase *Guillen*, the record evidenced that defendant realized and then acted in total disregard of the danger to Pineda.

Defendant's reliance on Justice Kennard's concurring opinion in *People v. Bryant* (2013) 56 Cal.4th 959, 971, to the effect that any felony—whether inherently dangerous or not—would support an involuntary manslaughter instruction misses the point. First, a

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an act endangering [the inmate's] life, i.e., each appellant participated in the assault by hitting, kicking, or stomping [the inmate]. Additionally, there was evidence each appellant realized the danger and acted in total disregard of that danger." (*Guillen*, *supra*, 227 Cal.App.4th at pp. 1027–1028.)

concurring opinion is not authoritative, as defendant himself concedes. Second, the Supreme Court in *Bryant* expressly eschewed deciding whether the trial court erred in not giving an involuntary manslaughter instruction because that issue was not the basis for its grant of review and not argued in the appellate court. (*Bryant*, at pp. 970–971.) Most important, the evidence adduced at trial here would not have supported any finding of criminal negligence for the reasons detailed above.

Defendant's reliance on *People v. Morales* (1975) 49 Cal.App.3d 134 fails for the same reason. There, the appellate court reversed a robbery and first degree murder conviction where the victim of a purse snatching causing her to fall died two weeks later from a blood clot in her lungs. The appellate court held that it was error not to instruct on the lesser included offense of grand theft from a person because the jury could have found the absence of force necessary for a robbery conviction. The court then considered the impact of that ruling upon the jury instructions in the retrial of the matter. It held that because grand theft was not an inherently dangerous felony, it would support an involuntary manslaughter instruction "if [the jury] find that his act was committed 'without due caution and circumspection.'"[9] (*Id.* at p. 145.) Once again, here, the evidence simply did not support lack of caution or circumspection or criminal negligence.

It follows that defendant's final argument that defense counsel was ineffective in failing to request an instruction on involuntary manslaughter is also without merit. Because there was no evidence to support such an instruction, defense counsel quite correctly did not request one.

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[9] The Supreme Court cited *Morales* with approval in *People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on another ground in *People v. Blakely* (2000) 23 Cal.4th 82, 89.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.